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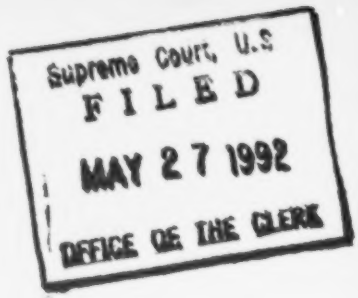


No. _____

IN THE SUPREME COURT
OF
THE UNITED STATES

October Term, 1991

DEAN A. FIRTION, Petitioner

v.

MARK HEBERT and RODNEY FOREY,
Respondents

Petition for Certiorari
To The United States Court of Appeals
for the Second Circuit

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The Court of Appeals affirmed the judgment, deeming harmless any error in the trial court because the trial court should have granted the respondents' motions for directed verdicts.

A. Did the Court of Appeals err when it reasoned that, unlike the trial court, it did not have to view the evidence in the light most favorable to the petitioner in deciding whether the respondents were entitled to the directed verdicts which the trial court denied?

B. Alternatively, did the Court of Appeals err because it concluded that, viewing the evidence in the light most favorable to the petitioner, the trial court mistook the facts and should have granted the respondents' motions for directed verdicts?

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## REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS OR ADMINISTRATIVE AGENCIES

None of the decisions below have been reported. All are appended except the denial of the petitioner's Petition for Rehearing in the Court of Appeals.

## STATEMENT OF GROUNDS ON WHICH SUPREME COURT JURISDICTION IS INVOKED

The District Court had jurisdiction of this matter pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1331, and also pursuant to 28 U.S.C. § 1332.

On 23 January 1992, the United States Court of Appeals for the Second Circuit filed the judgment which the petitioner prays that this Court review. On 27 February 1992, the United States Court of Appeals for the Second Circuit filed an order denying the respondent's petition for rehearing.

The petitioner believes that 28 U.S.C. § 1254(1) confers on this Court jurisdiction to review the judgment in question by writ of certiorari.

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

28 U.S.C. § 1652. State laws as rules of decision.
The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Fed. R. Civ. P. 50(a). Judgment as a Matter of Law.
(1) If during a trial by jury a party has been fully heard with respect to an issue and there is not legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross-claim, or third party

claim that cannot under the controlling law be maintained without a favorable finding on that issue.

(As amended 1 December 1991)

## STATEMENT OF THE CASE

The petitioner, who was the plaintiff below, claimed that a Brattleboro, Vermont, policeman and two Vermont state policemen had violated his guarantees against unreasonable search and seizure under the Constitutions of the United States and of the State of Vermont. Secondarily, his action was for assault, battery, trespass, and related Vermont torts stemming from the same occurrences that gave rise to his civil rights claims. Respondent Hebert counterclaimed for assault and battery. The District Court had jurisdiction over the 42 U.S.C. § 1983 action and the state tort claims pursuant to 28 U.S.C. §§ 1331.

The petitioner resided in Connecticut. None of the respondents resided there. The Complaint stated damages in the state tort claims that appeared to exceed the minimum for a diversity action under 28 U.S.C. § 1332.

This case came to trial in the United States District Court for the District of Vermont in 1991. The District Court sent the case to the jury after granting one policeman a directed verdict but denying the respondents' motions for directed verdicts. The jury found for the respondents on the petitioner's claim but also found for the petitioner on the counterclaim by respondent Hebert. Judgment in a Civil Case (Appendix at A4).

The petitioner timely appealed the judgment to the United States Court of Appeals for the Second Circuit.

The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

In the Court of Appeals, the petitioner argued that the District Court had erred in applying the doctrine of qualified official immunity to the respondent policeman insofar as it (1) submitted the entire question of qualified official immunity to the jury and reserved no part for itself, (2) refused to instruct the jury that an official performing a ministerial function lacks immunity, and (3) excluded evidence that the respondents were performing a ministerial rather than a discretionary function.

The petitioner's second appellate argument was that the District Court had erred in instructing the jury regarding the lawfulness of the respondents' entry into the petitioner's room, their search of his room, their seizure of him, and their eviction of him. Specifically, the petitioner argued that the District Court erred in instructing the jury that, when a citizen even partially opens the door of his dwelling in response to a knock by police, he loses his Fourth Amendment protection against search and seizure within his dwelling. He further argued that the District Court erred in instructing the jury that there were "numerous exceptions" to the warrant requirement and in implying that the presence of just one of the factors listed in cases that have discussed the exigent circumstances doctrine meant that exigent circumstances existed, contra Welsh v. Wisconsin, 466 U.S. 740 (1984). He argued that the District Court erred in telling the jury that a police officer may arrest a suspect in a motel room without a warrant if the motel would then have been justified in ejecting the suspect from his room. He also argued that the District Court erred in telling the jury to use the obsolete standard of Johnson v. Glick, 481 F.2d 1028 (2d Cir.), cert. denied, 414 U.S. 1033 (1973), to determine whether the respondents acted lawfully.

Aside from challenging the District Court's application of qualified official immunity and its instructions to the jury, the petitioner appealed various evidentiary rulings. These included needlessly implying that the petitioner was a convict, refusing to allow the petitioner to impeach police through the their depositions in other cases, and refusing to qualify the petitioner's only expert on police use of force because he "had no more experience . . . than a regular police or state police officer."

The petitioner also argued that the District Court erred in refusing to tell the jury to treat all parties the same regardless of their official positions or lack thereof, and in allowing respondent Forey to ask the jury to consider his reputation and how the verdict would affect it.

In the Court of Appeals, the respondents argued inter alia that any errors were harmless because the trial court should have granted their motions for directed verdicts. The petitioner countered that, resolving all factual conflicts in his favor as it had to, the trial court could not have granted the respondents' directed verdict motions.

The Court of Appeals declined to address any of the errors cited by the petitioner, on the ground of harmless error. The Court of Appeals held that, because the respondents were performing discretionary functions, and because "it was objectively reasonable for [them] to believe that their actions did not violate [the petitioner's] clearly established rights," they were "entitled to qualified immunity as a matter of law." The Court of Appeals affirmed the judgment. (Appendix at A2-3).

The petitioner moved for rehearing on two grounds. He argued that the Court of Appeals failed to view the evidence in the light most favorable to him when it decided

that the respondents were entitled to official immunity. As a specific example, the petitioner showed that a reasonable juror viewing the evidence in the light most favorable to the petitioner could find that respondent Hebert did not act with an objectively reasonable belief in the lawfulness of his actions. This evidence was that upon the mere suspicion of possessing marijuana, which was unfounded, and of misdemeanors, respondent Hebert shouldered his way into the petitioner's room and intentionally struck him in the forehead when he resisted entry. The petitioner also argued that, in affirming the trial court's decision on the basis that it should have directed a verdict for the respondent police because they were immune from suit, the Court of Appeals overlooked the trial court's error in excluding evidence that the police were performing ministerially and thus lacked immunity.

The Court of Appeals denied the petition for rehearing without comment.

In an attempt to simplify his petition for certiorari, the petitioner then moved for clarification of the affirmance. The petitioner thus sought to determine whether, although the District Court had denied the respondents' motions for directed verdicts, the Court of Appeals had concluded that no reasonable juror could have found for the petitioner. Alternatively, the petitioner surmised that the Court of Appeals, in holding as a matter of law that the respondents were immune, did not feel obliged to view the evidence in the light most favorable to the petitioner. By an entry filed on 22 April 1992, the Court of Appeals denied the petitioner's motion for clarification. (Appendix at A6-7).

## ARGUMENT FOR GRANTING THE WRIT

This argument must be in two alternatives, for the Court of Appeals failed to clarify the basis of its decision,

forcing the petitioner to attack the only two bases he can discern. These are mutually exclusive. The first possible basis is that the Court of Appeals reasoned that it could essentially grant the respondents' motions for directed verdict although the District Court had denied them, without having to view the evidence in the light most favorable to the non-movant petitioner. The second is that the Court of Appeals reasoned that, even though the District Court denied the respondents' motions for directed verdicts (thus implicitly holding that a reasonable juror might find that the respondents lacked immunity and were liable) no reasonable juror could have so found, even viewing the evidence in the light most favorable to the petitioner. This alternative would allow the Court of Appeals essentially to grant the motions for directed verdict that the District Court had denied, while still applying the same standard that governed the trial court's disposition of the directed verdict motions.

A. The decision of the Second Circuit should be reviewed because it conflicts with decisions of other Courts of Appeals defining the requisites for a directed verdict.

1. The Court of Appeals used an erroneous standard of review conflicting with five other circuits.

If, as in the first hypothesis above, the Court of Appeals decided that the respondents were immune as a matter of law without viewing the evidence in the light most favorable to the petitioner, the Court of Appeals not only erred but also rendered a decision in conflict with decisions of at least five other circuits. These circuits have reasoned that, in deciding whether error is harmless because the trial court should have directed a verdict for the appellee, the reviewing court must view the evidence in the light most favorable to the appellant.

In McLean v. Donoghue Transportation Co., 97 F.2d 356 (1st Cir. 1938), as in the instant case, the plaintiff appealed because the trial court had failed to instruct the jury as he had asked. The Court of Appeals held this harmless error, stating that "on the evidence submitted the District Court would have been warranted in directing a verdict for the defendant; that reasonable men could draw no other conclusion from it than that the [plaintiff's] conduct, if not the sole cause of the accident, was a contributory one, and in either case the verdict should be for the defendant." Id. at 359.

In Mitchell v. New England Mutual Life Insurance Co., 123 F. 2d 246 (4th Cir. 1941), an action for life insurance proceeds where the defendant insurer claimed that the plaintiff's decedent had committed suicide, the Fourth Circuit followed the same procedure when the plaintiff argued that refusing to give his requested jury instructions was error. The Court of Appeals held that any such error was harmless, "since the evidence established suicide so conclusively that [the defendant's] motion for directed verdict on that ground should have been granted." Id. at 247. The Court of Appeals decided that "plaintiff's theory that the gun went off accidentally while insured was hunting squirrels has nothing to support it." Id. "Under such circumstances reasonable men could have reached no other conclusion than that the insured shot himself intentionally; and defendant was entitled to a directed verdict to that effect." Id. at 248. If any doubt remained that the Fourth Circuit felt obliged to view the evidence in the light most favorable to the non-movant in deciding whether a directed verdict was warranted, it would be dispelled by the further observation that "[i]f the evidence is conflicting, or if different inferences can reasonably be drawn from it, the case is for the jury." Id.

In an analogous case, Cox v. C.H. Masland & Sons, Inc., 607 F.2d 138 (5th Cir. 1979), another court of

appeals held that failure to try a case before a jury was harmless error when the plaintiff's suit would not have survived a motion for directed verdict because there was no evidence that would have let a jury conclude that the defendant breached its duty to the plaintiff. Id. at 145. The court noted that it had to give the non-movant the benefit of every legitimate inference from the evidence, and that, if the inferences conflicted, the case should go to the jury. Id. at 144.

The Eighth Circuit has similarly held that directed verdict issues must be decided by accepting as true all the claims of the non-movant and the inferences therefrom. In Freeman Contractors v. Central Surety & Insurance Corp., 205 F.2d 607, 612 (8th Cir. 1953), the Court of Appeals further said "it is not sufficient that the court could or should have reached the same result in a jury waived trial." Instead, it held that denial of a jury trial would not be affirmed unless the reviewing court was convinced that the trial judge's determination to take the case from the jury was not a result of the trial judge's resolving conflicting testimony. Id. at 613. In Sterling Aluminum Products, Inc. v. Shell Oil Co., 140 F.2d 801 (8th Cir.), cert. denied, 322 U.S. 761 (1944), another case where the losing plaintiff claimed error because the trial court refused to give certain jury instructions, the Court of Appeals held that a judgment for the defendant would not be reversed on that account, where the District Court should have sustained the defendant's motion for a directed verdict. Id. at 804. This was also consistent with viewing the evidence in the light most favorable to the non-movant for a directed verdict, because the Court of Appeals noted that the plaintiff's theory of recovery was foreclosed by statute. Id. at 804. In a case similar to Sterling and to the instant case, Jones v. Mutual Life Insurance Company of New York, 113 F.2d 873 (8th Cir. 1940), the Eighth Circuit likewise found that any error in instructions did not prejudice the plaintiff when the trial court should have granted the

defendants' motions for directed verdicts. The motions should have been granted because the plaintiff failed to overcome a prima facia case established by a death certificate. Id. at 877. In other words, reasonable jurors could not have found for the plaintiff.

In deciding whether a jury decision was correctly precluded when "no reasonable jury" could properly have rendered a verdict for the defendant, the Ninth Circuit in Atwood v. Pacific Maritime Assoc., 657 F.2d 1055,1058 (9th Cir. 1981), likewise held that denying a jury trial under such circumstances was harmless error. The Court of Appeals could do this because it could "say with the utmost confidence that a Motion for a Directed Verdict would have been granted by the district court under Rule 50(a)." Id. at 1058.

2. The Court of Appeals erred in refusing to apply state law, as other circuits have.

If the Court of Appeals for the Second Circuit, in essentially granting the respondents a directed verdict after the trial court refused to do so, did not view the evidence in the light most favorable to the petitioner (as hypothesized above), its decision further conflicts with decisions of other Courts of Appeals because the reviewing court applied its own rule rather than the rule of the state where trial occurred. At least in diversity actions, the state rule must be applied. See 28 U.S.C. § 1652; Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). The District Court had jurisdiction of the petitioner's state tort claims not only as pendent to his 42 U.S.C. § 1983 claims, but also as a diversity action between residents of different states.

In Francone v. Southern Pacific Co., 145 F.2d 732 (5th Cir. 1944), the reviewing court applied state law to determine whether a party had a right to challenge

peremptorily a prospective juror because this was a substantial right. In Delaware & Hudson Railway Corp. v. Bonzik, 105 F.2d 341,343 (3d Cir. 1939), the reviewing court likewise applied state law to decide whether the trial court properly refused to enter judgments for the defendants notwithstanding verdicts for the plaintiffs.

If the Court of Appeals for the Second Circuit determined that its standard for harmless error (based on a directed verdict that should have been granted) differed from the Vermont Supreme Court's standard, the Court of Appeals should have applied the Vermont standard. Only in this way can the reviewing court ensure that the doctrine of Erie Railroad v. Tompkins will be followed. In Hanna v. Plumer, 380 U.S. 460, 467 (1965), this Court stated that the Erie doctrine rests partly on the realization that it would be unfair for the character or result of litigation materially to differ because suit was brought in federal court rather than in state court. If the Second Circuit used a directed verdict standard different from Vermont's, the Court of Appeals for the Second Circuit thereby caused the result of the litigation materially to differ from the result that would have been obtained in the Vermont Supreme Court.

The Vermont Supreme Court would have followed the Second Circuit's procedure as hypothesized above only by beginning with the premise that trial errors are harmless if the trial court should have granted the appellee a motion for directed verdict. Winter v. Unaitis, 124 Vt. 249, 204 A.2d 115 (1964) (error in jury instruction harmless if motion for directed verdict should have been granted); Russell v. Pilger, 113 Vt. 537,547, 37 A.2d 403 (1944); accord Staab v. Messier, 128 Vt. 380,381, 264 A.2d 790 (1970).

The Vermont Supreme Court's next step differs from the Second Circuit's second step hypothesized above, however. In deciding whether the trial court should have

granted the appellee a directed verdict under Rule of Civil Procedure 50(a), the Vermont Supreme Court views the evidence in the light most favorable to the appellant. The Vermont Supreme Court has stated that, in considering whether the trial court should have granted a defendant's motion for directed verdict, it "must, as has been repeatedly held, take the evidence in the light most favorable to the plaintiffs." Winter, 124 Vt. at 252, 204 A.2d at 117; Russell, 113 Vt. at 546. Only if, after so viewing the evidence, the Vermont Supreme Court determines that the appellee was entitled to a directed verdict, will the Vermont Supreme Court deem any other error harmless. See Winter, 124 Vt. at 250; Russell, 113 Vt. at 544.[1] In so doing, the Vermont Supreme Court reviews a trial court's directed verdict decision in the same manner as when the trial court refuses to direct a verdict and the movant appeals. E.g., Tolin v. Hasbrook, 116 Vt. 417,418, 77 A.2d 914 (1951) (in considering defendant's

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[1] This rule is not unique to Vermont. E.g., Groseth v. Ness, 421 P.2d 624,631 (Alaska 1966) (erroneous instruction held harmless error where defendant was entitled to directed verdict on evidence viewed in light most favorable to plaintiff). The petitioner has found only one state court applying the contrary principle that he believes the Second Circuit may have adopted. In Wade v. Roberts, 89 Ga. App. 607, 80 S.E.2d 728,731 (Ga. App. 1954), the intermediate court found any trial error in mis-instructing the jury harmless because the evidence, "taken in its light most favorable to the verdict" of the jury, would have allowed a properly instructed jury to find for the defendant, as it did.

directed verdict motion, evidence must be viewed in light most favorable to plaintiff).[2]

This Court has not decided whether, when one party moves to take the case from the jury in a diversity action, the sufficiency of the evidence for such a motion is determined by the federal or the state standard. See Simblest v. Maynard, 427 F.2d 1,5 (2d Cir. 1970) (reviewing decision of district court for the District of Vermont granting defendant judgment notwithstanding jury's verdict for plaintiff after denial of directed verdict for defendant). There is a conflict among the circuits in such cases. Federal Procedure (L.Ed.) 62:655 (1984 & Supp. 1991). If the Court of Appeals for the Second Circuit has indeed applied its own standard, it has decided an important question of federal law which has not been settled by this court, but which should be settled by this court.

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This rule is not unique to Vermont. E.g., Lincecum v. Missouri Pacific Railroad Co., 452 So.2d 1182,1186 (La. App. 1984). It is consistent with the 1991 revision of Federal Rule of Civil Procedure 50(a), which allows a directed verdict if "there is no legally sufficient evidentiary basis for a reasonable jury to have found for [the non-movant] with respect to that issue." (The 1991 revisions essentially codified this Court's decision in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) that a verdict could be directed only if all the evidence and reasonable inferences therefrom, viewed most favorably for the non-movant and without weighing the credibility of witnesses, points so strongly in favor of the movant that reasonable persons could not decide the case differently.)

B. Alternatively, the Court of Appeals erred when it deemed harmless the trial errors cited by the petitioner, reasoning that, viewing the evidence in the light most favorable to the petitioner, the trial court should have granted the respondents' motions for directed verdicts.

If the Court of Appeals viewed the evidence in the light most favorable to the petitioner but still decided that the respondent policemen were entitled to directed verdicts as a matter of law, even though the District Court refused to grant directed verdicts, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision, pursuant to Supreme Court Rule 10.1(a). If the Court of Appeals decided the issue this way, it implicitly held that the District Court erred in deciding as a matter of fact that a reasonable juror might have found for the petitioner if the juror viewed the evidence in the light most favorable to the petitioner.

It is inconceivable that the District Court could have erred in this regard, because the District Court's refusal of a directed verdict was based on a factual determination, not a legal one. To be sure, in some cases, a denial of a directed verdict may be properly reversed on appeal because it rests on a misunderstanding of the law. For example, if the District Court had not recognized the doctrine of qualified official immunity, the respondents could argue that its denial of their motions for directed verdicts stemmed from that nonrecognition, not from the court's determination that the evidence might not allow the court to determine that the respondents were immune. There was no such legal error here. The District Court recognized the doctrine of qualified official immunity. In fact, it stated it in terms more favorable to the respondents than was appropriate, e.g., by so misstating the exceptions

to the Fourth Amendment's warrant requirement that, in view of the District Court's instructions based on Harlow v. Fitzgerald, 457 U.S. 800,815 (1982), the jury easily could have concluded that the respondents reasonably believed they were acting within the scope of their authority.

The District Court's denial of the respondents' motions for directed verdicts had to stem from the factual determination that the respondents either (1) were not acting within the scope of their authority or at least reasonably believed they were so acting, (2) were not acting in good faith, or (3) were not performing ministerial acts, taking the evidence in the light most favorable to the petitioner. Given the District Court's refusal to even instruct the jury on ministerial as opposed to discretionary acts, the third alternative is extremely unlikely. The second alternative is possible, since the District Court actually instructed the jury on the punitive damages that it could award if it found the respondents' conduct so objectively unreasonable as to be malicious or in wanton disregard of the petitioner's rights. The first alternative is also possible, since the District Court gave the jury lengthy, although erroneous, instructions on the search and seizure laws which determined the scope of the respondent policemen's authority.

Under these circumstances, the Court of Appeals implicitly held that the trial judge mistook what a reasonable juror could have found from the evidence viewed in the light most favorable to the petitioner. In other words, relying only on a paper record, the Court of Appeals second-guessed the trial judge who had the benefit not only of all the testimony in the record but also of seeing the demeanor of all the witnesses and the partial recreation in his courtroom of respondent Hebert's forcing his way into the petitioner's room and striking him in the forehead. This is simply not realistic.

The trial judge's denial of the respondents' motions for directed verdicts had ample support in the evidence. For example, from the evidence, a reasonable person could have found that respondent Hebert did not act with an objectively reasonable belief in the lawfulness of his actions when, upon the mere suspicion of possessing marijuana, which was unfounded, and minor misdemeanors, respondent Hebert shouldered his way into the petitioner's room and struck him in the forehead when he resisted entry. If the Court of Appeals concluded from such evidence that a directed verdict for this policeman was warranted, its conclusion was so unsupported that this court should review it.

20 May 1992.

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Counsel of Record

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of January, one thousand nine hundred and ninety-two.

United States Court of Appeals
Filed January 23, 1992
Elaine B. Goldsmith, Clerk
Second Circuit

**Present:**

HONORABLE ELLSWORTH A. VAN GRAAFEILAND

HONORABLE RICHARD J. CARDAMONE

Circuit Judges

HONORABLE CHARLES E. STEWART

District Judge*

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DEAN FIRTION,
Plaintiff-Appellant,

v.

MARK HEBERT; RODNEY FOREY
Defendants-Appellees,

ORDER
Docket No.
91-7782

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* Hon Charles E. Steward, United States District Court Judge for the Southern district of New York, sitting by designation.

BRATTLEBORO POLICE DEPARTMENT; TOWN OF BRATTLEBORO; JAMES MARKIEWICZ; SUBHASH VAIDYA, doing business as Red Coach Motor Inn,
Defendants.

Issued as Mandate. March 31, 1992

Plaintiff-appellant Dean Firtion appeals from the April 3, 1991 judgment, after a jury verdict, of the United States District Court for the District of Vermont (Billings, C.J.) in favor of defendant police officers on his 42 U.S.C. § 1983 cause of action and state law claims.

At the close of Firtion's case, appellees, Officer Mark Hebert and Trooper Rodney Forey, moved for a directed verdict, based, in part, on their assertion of qualified immunity. The district court denied this motion and sent the case to the jury, which returned a verdict in favor of the officers.

While appellant raises several claims of error on appeal, we need not reach these issues since, as a matter of law, appellees were entitled to qualified immunity. See, e.g., Scivally v. Time Ins. Co., 724 F.2d 101, 103 (2d Cir. 1983) (reviewing court is entitled to affirm on any basis for which there is support in the record); Bigelow v. Agway, Inc., 506 F.2d 551, 555 (2d Cir. 1974) (same).

Government officials performing discretionary functions are immune from civil liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The test is an objective one, and the relevant inquiry is whether "a reasonable officer could have believed [the official action] to be lawful, in light of clearly established

law and the information . . . possessed" by the officer at the time the action was taken. Anderson v. Creighton, 483 U.S. 635, 641 (9187). Because it was objectively reasonable for appellees to believe that their actions did not violate appellant's clearly established rights, Robison v. Via, 821 F.2d 913, 921 (2d Cir. 1987), appellees are entitled to qualified immunity as a matter of law.

The judgment of the district court is affirmed.

Ellsworth A. Van Graafeiland
Ellsworth A. Van Graafeiland, U.S.C.J.

Richard J. Cardamone
Richard J. Cardamone, U.S.C.J.

Charles E. Stewart
Charles E. Stewart, U.S.D.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

**UNITED STATES DISTRICT COURT**
**District of Vermont**

**JUDGMENT IN A CIVIL CASE**

Dean Firtion

v. Case No. 90-126

Mark Hebert, et al.

X **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

**Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendant Mark Hebert is no liable to the Plaintiff for violation of his civil rights and other claims. Defendant Rodney Forey is not liable to Plaintiff for violation of his civil rights and other claims. Plaintiff is not liable to Defendant Mark Hebert on the counterclaim.

Plaintiff's claims against Defendants Town of Brattleboro, Brattleboro Police Department and Vermont Department of Public Safety were dismissed on August 7, 1990. Plaintiff's claims against Defendants Forey and Markiewicz in their official capacity were dismissed on August 7, 1990. Voluntary Dismissal with Prejudice as to Defendant Subhash Vaidya d/b/a Red Coach Motel on March 26, 1991. Motion for Directed Verdict as to Defendant James Markiewicz granted April 1, 1991.

April 3, 1991
Date

Richard P. Wasko
Clerk

C. Burbank
(By) Deputy Clerk

Previous requests for similar relief and disposition: N/A

**Statement of the issue(s) presented by this motion**: Shall the Court clarify its 23 January 1992 order to show whether the statement therein, "as a matter of law, appellees were entitled qualified immunity," means that no reasonable juror, viewing the evidence in the light most favorable to the appellant, could have found sufficient facts on the basis of which the trial judge could have held that one or more of the appellees lacked immunity?

Shall the Court stay its mandate until 30 days after it clarifies its 23 January 1992 order?

**Brief statement of the facts (with page references to the moving papers)**: The District Court denied the appellees' motions for directed verdict, thus implicitly holding that a reasonable juror, viewing the evidence in the light most favorable to the appellant, could have found sufficient facts on the basis of which the trial judge could have held that one or more of the appellees lacked immunity. Docket Entry 97 (A7); T.5:142-44. The trial judge was in doubt regarding the facts necessary to support immunity. See Jury Instructions, T.6:72-73 (A439-40).

**Summary of the argument (with page references to the moving papers)**: Clarification is necessary so the appellant can decide upon the proper contents of his petition for certiorari. If this Court did not follow the criterion in the Statement of Issues supra, the appellant will argue that it should have, pursuant to Vermont case law and F.R.C.P. 50, as amended in 1991. If this Court did apply this criterion, the appellant will argue that had to go beyond its immunity decision and address the merits of the appeal because the trial court, refusing to direct a verdict for the

appellee, implicitly held that a reasonable juror could have found facts on the basis of which the appellees would lack immunity. This Court should stay its mandate until 30 days after it clarifies its order.

**AFFIDAVIT**

I swear that the statement of facts above is accurate, that the criterion that this Court used in affirming the judgment is unclear to me, and that clarification will greatly affect the content of a petition for certiorari.

Herbert G. Ogden, Jr.
Herbert G. Ogden, Jr., Esq.

Sworn to and subscribed before me this 1st day of April, 1992.

Jill Mumford
Notary Public

Supreme Court, U.S.
FILED
JUN 25 1992
OFFICE OF THE CLERK

(3)

No. 91-1947

In The

# Supreme Court of the United States

October Term, 1991

DEAN A. FIRTION,

*Petitioner,*

v.

MARK HEBERT and RODNEY FOREY,

*Respondents.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## RESPONDENT FOREY'S BRIEF IN OPPOSITION TO THE PETITION

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## QUESTIONS PRESENTED

Respondent does not agree that the questions framed by Petitioner are presented by this record:

A. There is no suggestion in the Court of Appeals' summary order that the Court did not view the evidence in the light most favorable to Petitioner in deciding Respondents were entitled to qualified immunity as a matter of law.

B. Under the rules in effect at the time of trial, the trial court's initial denial of the motion for directed verdict has no presumptive weight; instead, the "court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion."

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## JURISDICTION

This action was originally commenced by the Petitioner in the United States District Court for the District of Vermont. Jurisdiction there was founded on 28 U.S.C. § 1332 and § 1343. Judgment was entered on an April 2, 1991, jury verdict in favor of Respondent Forey. Petitioner timely appealed to the Second Circuit Court of Appeals, and the Second Circuit affirmed the judgment of the district court by summary order entered January 23, 1992. Petitioner's Petition for Rehearing was denied by order entered February 27, 1992.

On May 27, 1992, Petitioner filed his Petition for a Writ of Certiorari to the United States Supreme Court. The jurisdiction of this Court to review cases in the courts of appeal by writ of certiorari is granted by 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

> "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion."

Fed.R.Civ. 50(b) (1991).

## STATEMENT OF THE CASE

This is an action in which the Petitioner claimed an excessive use of force against him by a policeman for the Town of Brattleboro and two Vermont state policemen. After six days of trial, a directed verdict was entered in favor of one of the state policemen and the jury returned a verdict for the remaining officers. The judgment was affirmed by the United States Court of Appeals for the Second Circuit. Petitioner seeks review by Writ of Certiorari. The issue presented is whether the Court of Appeals had authority to determine that Respondent Forey was entitled to qualified immunity.

### Facts

Respondent Rodney Forey, then a trooper with the Vermont State Police, was called to assist the Brattleboro Police Department at a disturbance at the Red Coach Inn in Brattleboro, Vermont.

Prior to Trooper Forey's arrival, the Brattleboro police had already entered Petitioner's room, Petitioner had been hit with a flashlight and was wounded and bleeding, the room had been searched, and most of the occupants had obeyed orders to leave or had been arrested.

Trooper Forey escorted the Petitioner out of the motel room and down a flight of stairs. To do so, Trooper Forey testified he placed his right hand behind the Petitioner's left bicep and placed his left hand by the Petitioner's left wrist, an escort maneuver known as "open hand control". At trial, Petitioner claimed Trooper Forey grabbed his

arm, twisted it behind his back, and made the Petitioner run down the stairs.

Petitioner was not arrested. Once outside the motel room, Petitioner refused an ambulance which had been called for him, and Trooper Forey went to his cruiser and got first-aid supplies for the Petitioner. Forey then left the Red Coach Inn at 2:22 a.m., having been at the scene for about twenty (20) minutes.

Over an hour later, there was another disturbance at the Red Coach Inn. At that time the Petitioner was issued a citation by a Brattleboro police officer for disorderly conduct, and another Vermont state trooper transported the Petitioner to the hospital for the cut on his forehead received from a Brattleboro police officer in the earlier incident. Petitioner made no complaint of any physical injury or discomfort other than that cut while at the hospital.

**Proceedings Below**

During trial, Respondent moved for directed verdict on grounds of qualified immunity. The verdict in his favor obviated the need for the trial court to make final determination of the legal questions raised by the motion. Fed.R.Civ.P. 50(b) (1991).

On appeal, Respondent argued that judgment should be affirmed because he was entitled to directed verdict on the issue of immunity. The court of appeals agreed.

In a summary order, the court ruled Respondent was entitled to qualified immunity as a matter of law:

> "Government officials performing discretionary functions are immune from civil liability 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). The test is an objective one, and the relevant inquiry is whether 'a reasonable officer could have believed [the official action] to be lawful, in light of clearly established law and the information . . . possessed' by the officer at the time the action was taken. *Anderson v. Creighton,* 483 U.S. 635, 641 (1987). Because it was objectively reasonable for appellees to believe that their actions did not violate appellant's clearly established rights, *Robison v. Via,* 821 F.2d 913, 921 (2d Cir. 1987), appellees are entitled to qualified immunity as a matter of law."
>
> (A2-A3.)

## SUMMARY OF ARGUMENT

This Court should not grant certiorari merely for the purpose of determining whether Petitioner has received proper appellate review.

The hypotheses presented by Petitioner are cloaked in misplaced speculation and conjecture which attempt to discredit the appellate court's affirmance and ruling that Respondents were entitled to qualified immunity as a matter of law. The lower court may affirm on any basis for which there is support in the record, and recourse to the speculation upon which the Petitioner relies is without basis.

## ARGUMENT

### THE PETITION RAISES NO SPECIAL OR IMPORTANT REASON FOR GRANTING CERTIORARI.

A review on writ of certiorari will be granted only when there are "special and important reasons therefor." Sup. Ct. R. 10.1. The decision below represents the routine appellate work of the court of appeals. The court of appeals reviewed an extensive record and determined Trooper Forey was entitled to qualified immunity as a matter of law. Petitioner is here seeking a second level of appellate review. But this is not and cannot be the current function of the writ of certiorari. Petitioner has advanced no "special or important" reason for this Court to become involved with this case.

This case does not present a conflict among the courts of appeals. It is well-settled law that an appellate court may affirm on any basis for which there is support in the record. *See, e.g., Scivally v. Time Ins. Co.*, 724 F.2d 101, 103 (2d Cir. 1983); *Fairview Township, Pennsylvania v. United States Environmental Protection Agency*, 773 F.2d 517 (3d Cir. 1985); *Dimond v. District of Columbia*, 792 F.2d 179 (D.C. Cir. 1986); *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226 (Fed. Cir.), *cert. denied*, 493 U.S. 853, 107 L.Ed.2d 112 (1989); *United States v. One Lot of U.S. Currency ($68,000)*, 927 F.2d 30 (1st Cir. 1991); *SIDCO Products Marketing, Inc. v. Gulf Oil Corp.*, 858 F.2d 1095 (5th Cir. 1988); *United States v. Anderson County, Tenn.*, 761 F.2d 1169 (6th Cir.), *cert. denied*, 474 U.S. 9191, 88 L.Ed.2d 256 (1985); *McCarthy v. Kemper Life Ins. Cos.*, 924 F.2d 683 (7th Cir. 1991); *Nichols v. City of St. Louis*, 837 F.2d 833 (8th Cir. 1988); *Jackson v. Southern California Gas Co.*, 881 F.2d 638 (9th Cir. 1989); *Schalk v. Gallemore*, 906 F.2d 491 (10th Cir. 1990).

Petitioner's hypotheses concerning the reasoning of the Second Circuit Court of Appeals are without merit. *Finnegan v. Fountain*, 915 F.2d 817 (2d Cir. 1990), teaches that even if there is a basis for a jury to find constitutionally excessive force was used against a person, "it is for the district judge to determine whether the unlawfulness of the [alleged] conduct should have been apparent to [the officer] at the time." *Finnegan*, 915 F.2d at 823-24. *See Hunter v. Bryant*, ___ U.S. ___, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (per curiam). Thus, the district court judge in the first instance, and the court of appeals on review, must determine whether or not the officers are entitled to qualified immunity as a matter of law.

Respondent argued in the court of appeals that, even accepting Plaintiff's evidence, it was objectively reasonable for Trooper Forey to believe no constitutionally excessive force was used:

> "Viewing the evidence in the light most favorable to the Plaintiff – if Lieutenant Forey did what Plaintiff claims he did – it was still objectively reasonable for Lieutenant Forey to believe he was acting in a fashion that did not violate Plaintiff's (then) clearly established right to be free from force that 'shocked the conscience.'
>
> . . .
>
> There is no evidence of bad faith or malice. To the contrary, Lieutenant Forey personally went out of his way to get medical help for Plaintiff. When it was refused, he removed Plaintiff from the scene without any injury. If the force used caused some temporary hurt – even if the force used could by some stretch of

> the imagination have been found to be more than objectively reasonable – ('he grabbed [my arm] and twisted it and made me run down the stairs . . . '), the force allegedly used is not so excessive under the circumstances and so obviously unconstitutional under the (then) clearly established 'shock-the-conscience' standard of *Johnson v. Glick* that no reasonable law enforcement officer could have believed his actions were proper."
>
> (Brief of Defendant-Appellee Rodey Forey at 7, 8.)

In the court of appeals' ruling that "it was objectively reasonable for appellees to believe that their actions did not violate appellant's clearly established rights," (A3) there is absolutely no suggestion that the court did not view the evidence in the light most favorable to Petitioner. The first question raised in the Petition is simply not presented by this record.

Petitioner's second contention, that the appellate court must have erred even if it viewed the facts in the light most favorable to the Petitioner because it differed from the trial court's decision regarding the directed verdict motions, is also without basis. Under the rules in effect at the time of trial, the trial court's initial denial of the motion for directed verdict has no presumptive weight. Instead, "the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." Fed.R.Civ.P. 50(b) (1991). The district court's later review was obviated by the jury verdict and, under familiar principles discussed above, the court of appeals was entitled to affirm on the basis that Respondents were entitled to

qualified immunity as a matter of law. In determining whether a verdict should have been directed, the appellate court applies the same standard as does the trial court in passing on the motion originally. Litigants are entitled to full review of legal issues by the appellate court without special deference to the views of the trial court. 9 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2536 at 595 (1971).

This Court should not grant certiorari merely for the purpose of determining whether Petitioner has received proper appellate review. The Petition raises no special or important reason for granting certiorari.

## CONCLUSION

The court of appeals had authority, taking the evidence in the light most favorable to Petitioner, to determine Respondents are entitled to qualified immunity as a matter of law because it was objectively reasonable for Respondents to believe that their actions did not violate Petitioner's clearly established rights. This case does not present the questions framed by Petitioner, nor does it present any special or important issue appropriate for this Court's review.

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be DENIED.

Respectfully submitted,

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(4)

No. 91-1947

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1991

DEAN A. FIRTION,

*Petitioner,*

*vs.*

MARK HEBERT and RODNEY FOREY,

*Respondents.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## BRIEF IN OPPOSITION FOR RESPONDENT MARK HEBERT

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## QUESTION PRESENTED

Whether the United States Court of Appeals for the Second Circuit erred in affirming the judgment of the district court on the basis that the Respondents were entitled to qualified immunity as a matter of law.

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No. 91-1947

In The

# Supreme Court of the United States

October Term, 1991

DEAN A. FIRTION,

*Petitioner,*

*vs.*

MARK HEBERT and RODNEY FOREY,

*Respondents.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## BRIEF IN OPPOSITION FOR RESPONDENT MARK HEBERT

## STATEMENT OF THE CASE

The Petitioner has presented a statement of the case setting forth the general background of this action. Respondent Hebert finds it necessary, however, to bring some corrections and additions to the attention of the Court. Record cites are to the

trial transcript (T) or joint appendix (JA) filed in the Second Circuit.

The events which gave rise to this action began in the early morning hours of May 7, 1988, when the Petitioner and several friends converged on a motel room in Brattleboro, Vermont, following an evening at a local bar (T.Vol.I: 32, 68, 72, 77-78). Guests in the motel complained to the desk clerk about the noise in the room occupied by Petitioner (T.Vol.II: 78) (JA 224). The clerk warned the occupants that they would have to quiet down or leave the motel, however, the warning proved to be ineffective (T.Vol.II: 85, 87) (JA 230, 232). The desk clerk telephoned the Brattleboro Police Department and Respondent Hebert, a Brattleboro police officer, was dispatched to the motel (T.Vol.II: 87-88) (JA 491).

The desk clerk advised Respondent Hebert of both the noise complaint and the fact that occupancy of the room was limited to three people (T.Vol.II: 79, 89) (JA 225, 492). Further, Respondent was informed that if the occupants did not cooperate, everyone was to leave the room (T.Vol.II: 89) (JA 492).

Respondent Hebert proceeded to the motel room and, with his flashlight in his left hand, knocked on the door (T.Vol.III: 137) (JA 303). Petitioner opened the door and engaged in a short conversation with Respondent Hebert during which Respondent confirmed that a party was underway and that there were more than three people in the room (T.Vol.I: 36; Vol. III: 129; Vol.IV: 69) (JA 166, 299, 513).

As Respondent Hebert was explaining to Petitioner that he and his friends were going to have to leave, Respondent stepped into the doorway (T.Vol.III: 129) (JA 299). Petitioner slammed the door, pinning Respondent between the door and the door frame in such a manner that his left arm was inside the room

(T.Vol.III: 132, 160; Vol.IV: 70). Respondent, fearing for his safety, (T.Vol.III: 133; Vol.IV: 71) (JA 301, 342) attempted unsuccessfully to push the door open to free his arm (T.Vol.III: 163) (JA 314). He then flicked his left wrist, intentionally striking Petitioner in the forehead with his flashlight with just enough force to free himself[1] (T.Vol.III: 60) (JA 459). Petitioner released the door and Respondent called for backup (T.Vol.IV: 72).

Petitioner was charged with and convicted of the criminal offense of simple assault by reason of his slamming Respondent Hebert in the doorway (T.Vol.I: 5-6, 10-11).

Petitioner filed suit in the United States District Court for the District of Vermont in May of 1990, alleging a cause of action pursuant to 42 U.S.C. § 1983 and asserting various state law claims. Petitioner did not, as suggested in his Petition, invoke diversity jurisdiction pursuant to 28 U.S.C. § 1332.

Trial was held in the United States District Court for the District of Vermont, the Honorable Franklin S. Billings presiding, on March 26, 1991, through April 3, 1991. At the conclusion of the Petitioner's case, Respondent Hebert moved for a directed verdict based, in part, on qualified immunity. The motion was denied (T.Vol.IV: 166) (JA 6). The motion was renewed at the close of all the evidence and denied (T.Vol.V: 134-38) (JA 7). The case was submitted to the jury and a verdict was returned in favor of Respondent Hebert.

Petitioner appealed to the United States Court of Appeals for the Second Circuit. The Second Circuit affirmed the judgment

---

1. In his statement of the case, Petitioner incorrectly implies that Respondent Hebert forced his way into the motel room because of evidence of marijuana use and struck the Petitioner because Petitioner resisted entry. Petition for Certiorari, at 6. These assertions are not supported by the record.

of the district court. In a unanimous, unpublished decision, the Second Circuit found that it need not reach the numerous claims of error advanced by Petitioner on appeal because it was objectively reasonable for the Respondents to believe that their actions did not violate Petitioner's clearly established rights, and therefore, the Respondent was entitled to qualified immunity as a matter of law. *Firtion v. Hebert,* No. 91-7782 (2nd Cir., Jan. 23, 1992). Petitioner now seeks review of that decision by writ of certiorari.

## SUMMARY OF ARGUMENT

Respondent Hebert opposes the request by Petitioner for a writ of certiorari to determine whether the Second Circuit erred in concluding that the Respondents were entitled to qualified immunity as a matter of law.

The Second Circuit correctly stated the standard for application of the doctrine of qualified immunity. There is no basis to infer that the Second Circuit rendered a decision in conflict with the opinions of other United States courts of appeals. Petitioner's argument relies entirely on two inapposite hypothetical interpretations of the decision of the Second Circuit and fails to provide this Court with a basis to grant certiorari.

## REASONS FOR DENYING THE WRIT

### I.

**The Second Circuit Correctly Determined that the Respondents Were Entitled to Qualified Immunity as a Matter of Law.**

In an effort to create a reviewable question where none exists, the Petitioner has mischaracterized the holding of the Second

Circuit by hypothesizing that the Second Circuit substituted its judgment as to a factual issue for that of the district court. The Petitioner claims that the Second Circuit "*implicitly* held that the District Court erred in deciding as a matter of fact that a reasonable jury might have found for the Petitioner if the jury viewed the evidence in the light most favorable to the Petitioner." Petition for Certiorari, at 14 (emphasis added). Nowhere, however, does the Second Circuit determine that any factual findings were even made by the district court, much less made erroneously.[2]

The Second Circuit commences its analysis by applying the traditional rule that it can affirm the judgment of the district court on any ground supported by the record. Petitioner does not argue in his Petition that the Second Circuit's statement of the rule conflicts with applicable law. Indeed, Petitioner could not so argue because the cornerstone for this precept is found in the decisions of this Court. *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (quoting *Helvering v. Gowran*, 302 U.S. 238, 245 (1937)).

The Second Circuit proceeds to simply, and accurately, recite the standard for applying qualified immunity in concluding that "[b]ecause it was objectively reasonable for appellees to believe that their actions did not violate appellant's clearly established rights, *Robison v. Via*, 821 F.2d 913, 921 (2nd Cir. 1987), appellees are entitled to qualified immunity as a matter of law." *Firtion v. Hebert, supra* at 2. This holding is a correct application of the decisions handed down by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Anderson v. Creighton*, 483 U.S. 635 (1987).[3] Because Petitioner cannot argue that the Second Circuit

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2. The record is silent as to the district court's rationale for denying the Respondent's motion for directed verdict.

3. In addition, this Court has observed that qualified immunity provides "ample protection to all but the plainly incompetent or those who knowingly

(Cont'd)

misstated the legal standard for qualified immunity, he has engaged in a plethora of postulation which fails to alter the fact that his argument is based upon a faulty premise not supported by the decision of the Second Circuit.

## II.

**The Decision of the Second Circuit Does Not Conflict With Decisions of Other Courts of Appeals.**

### A. The Second Circuit used the correct standard of review.

Petitioner argues that in reaching its decision the Second Circuit erroneously applied a directed verdict standard that conflicts with other circuits. How Petitioner arrives at that conclusion is a mystery.

The decision of the Second Circuit contains no express language indicating the exact standard of review applied by the court. Nonetheless, Petitioner seeks to infer from the court's silence that the Second Circuit inexplicably chose this case to use an anomalous standard of review. This reasoning is not supported by well settled case law of the Second Circuit or by the decision rendered in this case.

In its discussion of the appropriate standard for review, the Second Circuit cites to *Bigelow v. Agway, Inc.*, 506 F.2d 551 (2nd Cir. 1974). *Bigelow* not only provides the rationale for affirmance on any basis supported by the record; it also succinctly states the standard uniformly applied by the Second Circuit when reviewing the disposition of a motion for directed verdict.

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(Cont'd)
violate the law . . . . [I]f officers of reasonable competence could disagree on the issue immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 349-50 (1986).

> In determining whether a motion for directed verdict should be granted, the evidence must be viewed most favorably to the party against whom the motion is made . . . . The non-moving party is given the benefit of all reasonable inferences from the evidence, and evidence unfavorable to it may be considered only if that evidence stands uncontradicted and unimpeached.

506 F.2d at 554 (citations omitted).[4]

The standard of review utilized by the Second Circuit is completely consistent with that of every circuit,[5] and with this Court's pronouncement of the standard in *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990) and *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986).[6]

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4. *Accord, Vasbinder v. Ambach*, 924 F.2d 1333 (2nd Cir. 1991); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2nd Cir. 1990); *Granite Computer Leasing Corp. v. Travelers Indemnity Co.*, 894 F.2d 547 (2nd Cir. 1990) and *Knight v. United States Ins. Co.*, 804 F.2d 9, 10-12, (2nd Cir. 1986); *cert. denied*, 480 U.S. 932 (1987). *Vasbinder*, decided a month after the present action, reaffirms the Second Circuit's continuing adherence to the prevailing standard of review.

5. Petitioner merely identifies five other circuits which follow the customary standard of review, when in fact, every circuit has adopted this standard. *Accord, Charles Jacquin Et Cie, Inc. v. Distileria Seralles, Inc.*, 921 F.2d 467 (3rd Cir. 1990); *Ingram Coal Co. v. Mover Ltd. Partnership*, 892 F.2d 363 (4th Cir. 1989); *Lloyd v. John Deere Co.*, 922 F.2d 1192 (5th Cir. 1991); *Zamlen v. City of Cleveland*, 906 F.2d 209 (6th Cir. 1990); *Alvarado v. Picur*, 859 F.2d 448 (7th Cir. 1988); *City of Omaha Employees Betterment Ass'n v. City of Omaha*, 883 F.2d 650 (8th Cir. 1989); *Kaiser Development Co. v. City and County of Honolulu*, 913 F.2d 573 (9th Cir. 1990); *Federal Deposit Insurance Corporation v. Palermo*, 815 F.2d 1329 (10th Cir. 1987); *Pelletier v. Stuart James Co., Inc.*, 863 F.2d 1950 (11th Cir. 1989).

6. *Liberty Lobby* is specifically cited as authority in the *Vasbinder* case.

By citing to *Bigelow*, the Second Circuit effectively disposes of Petitioner's contention that a conflict exists between the Second Circuit and the other United States courts of appeals regarding the directed verdict standard.[7]

Absent conflict with this Court's directed verdict standard and absent conflict with the other circuit courts' directed verdict standards, review on this issue is not necessary. Certiorari need not be granted to review Petitioner's hypothetical contention that an erroneous standard was applied.

**B. It was not error for the Second Circuit to refuse to apply state law standards because the trial court did not exercise diversity jurisdiction.**

Petitioner argues that the Second Circuit was obligated to apply Vermont law as is the general rule in diversity cases. This argument must fail, however, because the Petitioner failed to meet the pleading requirements necessary to confer diversity jurisdiction.

Contrary to Petitioner's statement of the case, it does not "appear" from the complaint that diversity jurisdiction existed.[8] Petitioner did not include a statement of jurisdiction in his complaint or in his brief to the Second Circuit. The complaint simply alleged that this matter was a civil action pursuant to 42 U.S.C. § 1983, the Vermont Constitution and various state statutes.

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7. In order to give any consideration to the argument advanced by the Petitioner, one must first conclude that the Second Circuit chose to disregard its own precedent. There is no basis to so conclude.

8. "The essential elements of diversity jurisdiction must be alleged in the pleadings." 13B C. Wright, A. Miller & F. Cooper, *Federal Practice and Procedure: Jurisdiction*, § 3603 at 372 (2d ed. 1984).

Each required element of 28 U.S.C. § 1332 was conspicuously absent from Petitioner's complaint. The requisite amount in controversy in excess of $50,000.00[9] was not alleged in the complaint and diverse citizenship of the parties was not expressly pleaded.[10] Consequently, Petitioner's complaint failed to provide the trial court with the basis to confer diversity jurisdiction. The

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9. Diversity jurisdiction attaches only in cases where the amount in controversy exceeds $50,000.00. 28 U.S.C. § 1332. The amount must be alleged "upon the face of the complaint." *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 292 (1938). "The general federal rule has long been to decide what the amount in controversy is from the complaint itself." *Horton v. Liberty Mutual Ins. Co.*, 367 U.S. 348, 353 (1961). This rule stems from the broader principle which states that whenever a jurisdictional amount is required, "plaintiff must properly allege the amount in controversy." 14A C. Wright, A. Miller & F. Cooper, *Federal Practice and Procedure: Jurisdiction*, § 3702 at 16 (2d ed. 1984) (*citing, Schlesinger v. Councilman*, 420 U.S. 738 (1975)).

Petitioner failed to allege the requisite amount in excess of $50,000.00 in his complaint. Nowhere on the face of the complaint was a dollar amount alleged with respect to damages. Petitioner's complaint merely alleged general damages. Because the complaint did not contain the specific dollar amount required by the statute, diversity jurisdiction did not exist at the trial level.

10. Where jurisdiction "depends upon the citizenship of the parties, such citizenship . . . should be distinctively and positively averred in the pleadings." *Anderson v. Watt*, 138 U.S. 694, 702 (1891). For diversity jurisdiction to attach, a complaint must affirmatively allege on its face the diverse citizenship of the various parties to the action. *Realty Holding Co. v. Donaldson*, 268 U.S. 398 (1925). "An allegation of 'residence' alone is not enough." 13B C. Wright, A. Miller & F. Cooper, *Federal Practice and Procedure: Jurisdiction*, § 3611 at 517 (2d ed. 1984) *(citing, Sun Printing & Publishing Ass'n v. Edwards*, 194 U.S. 377 (1904), *Neel v. Pennsylvania Co.*, 157 U.S. 153 (1895), *Bingham v. Cabot*, 3 Dall. (3 U.S.) 302 (1798)). In his complaint, Petitioner refers to each party merely as "residents" of their respective states. Petitioner's failure to plead the citizenship of each party precluded the trial court from conferring diversity jurisdiction.

case was correctly treated as a federal question case only.

The premise for Petitioner's contention that state law should have been applied is fundamentally flawed owing to Petitioner's failure to observe the pleading requirements necessary to invoke diversity jurisdiction. Certiorari should not be granted on this claim of error.

**C. The directed verdict standard utilized by the Second Circuit is identical to the standard utilized by the Vermont Supreme Court.**

Petitioner suggests that the Second Circuit may have used a directed verdict standard which differs from that utilized by the Vermont Supreme Court. Contrary to Petitioner's suggestion, however, the Vermont Supreme Court utilizes the same standard for directed verdict review as this Court, the Second Circuit and the other United States courts of appeals.[11]

At the time of trial, Vermont Rule of Civil Procedure 50 was identical to Federal Rule of Civil Procedure 50.[12] Similarly, Vermont case law defining the standard for application of the directed verdict standard mirrors federal law. Any claim of error based on the refusal to apply state law is, therefore, inconsequential because an application of Vermont law would not result in the use of a different directed verdict standard.

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11. *See e.g., Smith v. Gainer,* 153 Vt. 442, 571 A.2d 70 (1990); *Grann v. Green Mountain Racing Corp.*, 150 Vt. 232, 551 A.2d 1202 (1988). *Lussier v. North Troy Engineering Co.,* 149 Vt. 486, 544 A.2d 1173 (1988), *Sachse v. Lumley*, 147 Vt. 584, 524 A.2d 599 (1987), *Kinzer v. Degler*, 145 Vt. 410, 491 A.2d 1017 (1985).

12. Although FED. R. CIV. P. 50 was amended subsequent to trial, the amendment effects no change to the standard of review.

## CONCLUSION

For the reasons stated in this Brief, Respondent Hebert asks this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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# APPENDIX

**28 U.S.C. § 1332:**

**Diversity of citizenship; amount in controversy; costs**

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between —.

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

## Appendix (Cont'd)

**Vt. R. Civ. P. 50:**

### MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

**(a) Motion for Directed Verdict: When Made; Effect.** A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.